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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-586

ELMER O. CADY,
Petitioner,

v.

CHESTER J. DOMBROWSKI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RESPONSE NOT PRINTED

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

ELMER O. CADY,

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v.

CHESTER J. DOMBROWSKI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Elmer O. Cady, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 2, 1972, rehearing denied on July 24, 1972.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. The opinion of the District Court for the Eastern District of Wisconsin is reported as *Dombrowski v. Cady* (1970), 319 F. Supp. 530.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 2, 1972. A timely petition for rehearing en banc was denied on July 24, 1972, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Is a police officer engaged in a "search" within the meaning of the Fourth Amendment when, seeking to locate property of a person under arrest for drunk driving, he opens the trunk of the person's disabled vehicle and discovers what later develops to be evidence of a murder of which he had no previous knowledge or suspicion?

The Court of Appeals held in the affirmative.

2. If the first question is answered in the affirmative, is such a search "unreasonable" within the meaning of the Fourth Amendment?

The Court of Appeals held in the affirmative.

3. Where a judge issues an order for the search and an order for impounding of a vehicle for evidence of the crime of murder and the vehicle is thereafter seized and removed to a police garage, is evidence obtained in the search the following day admitted at trial in violation of Fourth Amendment rights?

The Court of Appeals held in the affirmative.

STATEMENT OF THE CASE

The respondent was convicted by a jury on July 18, 1968, of first-degree murder and was sentenced to life imprisonment. The Wisconsin Supreme Court affirmed the jury conviction, *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N.W. 2d 349.

This habeas corpus proceeding followed and the District Court denied the writ following the Wisconsin Supreme Court's opinion holding that Dombrowski's Fourth Amendment rights were not violated.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit and on June 2, 1972, that court ruled that the respondent's Fourth Amendment rights were violated in the obtaining of evidence introduced at his trial.

At about 10:30 p.m. on September 11, 1967, the respondent, a Chicago police officer off duty, was involved in a one-car automobile accident in which the vehicle, a leased 1967 Ford Thunderbird, was rendered inoperative north of Kewaskum, Wisconsin. After being arrested for drunk driving Dombrowski pleaded for consideration because of his police officer status. Subsequently, after respondent had been taken to a hospital because of injuries, intoxication, and incoherency, one of the investigating officers, William Weiss of the Washington County, Wisconsin, Sheriff's Department, returned to the Ford Thunderbird which had been towed and parked *outside** of Honeck's Garage in Kewaskum in an attempt to locate respondent's service revolver which he understood Chicago police

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* It is not clear whether the Circuit Court of Appeals understood this important fact. State's brief in response to motion to suppress filed with trial court June 6, 1968.

officers were required to carry with them at all times. When Officer Weiss returned to the unattended vehicle he inspected the inside and found a book of rules and regulations of the Chicago Police Department but no gun. Then, still looking for the service revolver, Officer Weiss opened the trunk of the car. There he discovered a number of blood-covered items, including a pair of uniform pants, a pair of grey trousers, a policeman's nightstick with the name Dombrowski stamped on it, a uniform raincoat, a car-floor tarp or mat, a pail and towel, and numerous other items. The blood on some of these items was dry, but on others, particularly the car-floor mat, was still wet. While still under arrest for drunken driving, the respondent was questioned concerning the blood-covered items recovered from his vehicle. He asked to confer with an attorney and subsequently the attorney, under the respondent's directions, informed the Washington County District Attorney that there was a body lying near the family picnic area at the north end of his brother's farm. Shortly thereafter the dead body of a white male was found lying in a dump area of the farm. A single white sock was found near the body.

Subsequently, one of the investigating officers looked through the windows of a Dodge automobile parked in the farmyard. He saw a blood-covered briefcase on its floor. The back seat of the car and the back of the front seat of the car were also splattered or covered with blood. A search warrant was issued by the county judge at 8:15 p.m. for the Dodge vehicle and the judge ordered the sheriff to impound the vehicle. That evening the vehicle was towed to the sheriff's garage at Fond du Lac where it was marked as Exhibit #40 at the trial and still is being held as evidence.

The following morning, September 13, 1967, experts called in from the State Crime Laboratory by the sheriff removed all of the bloodied contents of the Dodge, including the back seat, front seat, backrest of back seat, a white sock, a portion of the floor mat in rear, attache case, and front floor mat, all of which were taken to the Crime Laboratory for clinical tests and later returned to the sheriff.

The search warrant had not been returned at the time of Mauer's search and was not *functus officio* as stated in the decision of the lower court. A partial, incomplete return was typed on September 13, 1967, but was not filed with the court until an appearance before the county judge when a formal return was made with sworn testimony taken, recorded, and transcribed by the official court reporter on September 14, 1967.

All of the bloodied items found in the search of the Dodge, as well as the items found in the trunk of the Thunderbird, were introduced and accepted as evidence at the trial.

In this habeas corpus proceeding and at trial the respondent contended that the items from the Thunderbird and the sock and partial floor mat from the Dodge were received in evidence in violation of his Fourth Amendment rights against unreasonable search and seizure.

Further facts are stated in the petition and in the opinion of the United States Court of Appeals for the Seventh Circuit contained in the appendix.

REASONS FOR GRANTING CERTIORARI

I. The Decision Below Conflicts With Decisions Of This Court.

A. The officer did not conduct a "search" of the Thunderbird.

Where a police officer is not searching for evidence, but inadvertently comes across evidence which turns out to be incriminating, this court has repeatedly held that the "plain view" doctrine applies. Most recently, in *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, this court said, 29 L.Ed. 2d 583:

> "* * * Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. Harris v United States, 390 US 234, 19 L Ed 2d 1067, 88 S Ct 992; Frazier v Cupp, 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420; Ker v California, 374 US, at 43, 10 L Ed 2d 743. Cf. Lewis v United States, 385 US 206, 17 L Ed 2d 312, 87 S Ct 424.
>
> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. * * *"

In *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067, this court held that evidence discovered inadvertently by the officer while performing custody functions relating to an impounded vehicle was not the result of a search of the car but a measure taken to protect the car while it was in police custody.

Thus, if there is no search, then no violation of constitutional rights. The Fifth Circuit Court of Appeals in *Haerr v. United States* (1957), 240 F. 2d 533, 535, coined the most quoted definition of the term "search":

> "A 'search' implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. * * *"

The above definition was applied by the Supreme Court of Wisconsin in this case in determining that there was no search at the time Officer Weiss made his inspection of the Thunderbird at the Kewaskum garage.

As in *Harris*, supra, the officer in this case was questioned closely at trial as to his purpose in going to the Thunderbird and opening the trunk of the vehicle. The following facts clearly establish the reasons for Officer Weiss's actions and justify those actions:

1. He understood that he had a duty under his department's "standard procedures" to secure in a place of safety property of persons in custody of his department.

2. Dombrowski repeatedly asserted his status as a Chicago police officer.

3. Officer Weiss understood that Chicago police officers carried their weapons with them at all times.

4. Dombrowski's damaged Thunderbird was left outside of Honeck's garage about seven miles from the sheriff's office and no guard was posted.

5. Dombrowski became incoherent at the hospital and could not be communicated with at the time.

6. Officer Weiss had no knowledge of Dombrowski being involved in a murder or any other crime except drunk driving.

The actions of Officer Weiss were litigated in a pretrial motion where Dombrowski was given every opportunity to establish the facts as to prior justification and inadvertence in connection with the discovery of the bloody items in the trunk of the Thunderbird. The judge, after considering all of the evidence, concluded that Officer Weiss was justified in his conclusion that he should attempt to locate Dombrowski's service revolver and the discovery of the evidence of murder was inadvertent. Again at trial the issue was litigated. A voir dire examination of Officer Weiss was conducted outside of the presence of the jury (Record Exhibit C, p. 46) and again Dombrowski was given the opportunity to test if Officer Weiss's motivations were other than to secure the property of Dombrowski in a safer location than a disabled automobile standing outside of a garage in the nighttime. Again the trial judge concluded there was prior justification and the evidence was inadvertently discovered. This situation where the trial judge closely examined the officer's acts is very similar to the trial court's actions in *Harris,* supra. The Court of Appeals for the District of Columbia noted this thorough action of the trial court in its decision in that case, *United States v. Harris* (1966), 370 F. 2d 477, 478, Note 3. This court approved of such precise and detailed findings. *Harris,* 19 L.Ed. 2d 1069.

This court recently denied certiorari where prior justification and inadvertence resulted in the discovery of evidence of crime in connection with police inventory procedures. *Cabbler v. Virginia* (1972, — U.S. —, 92 S.Ct. 1501, — L.Ed. 2d —. The Supreme Court of Virginia had held that police

department inventory practices designed to protect property of a citizen arrested away from home did not violate Fourth Amendment rights.

B. If there was a search, it was reasonable.

1. *Coolidge* standard misinterpreted by lower court.

The lower court stated at page 4, slip opinion, App. 105:

> "Under *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), warrantless searches are per se unreasonable. * * *"

Then, emphasizing that there are few exceptions, the court stated that to come within the exceptions it must be shown that the exigencies of the situation rendered the warrantless search imperative. It appears that the lower court is applying a standard much more strict than anticipated by the court in *Coolidge,* at 454-455. To adamantly insist that *Coolidge* teaches such strict doctrine would be to write out the dicta cited, supra, from *Coolidge* that the "plain view" doctrine is operative when coupled with inadvertence and prior justification for intrusion in a private area.

2. The lower court was not justified in changing trial court findings.

The Supreme Court of the State of Wisconsin agreed with the findings of the trial judge; the District Court for the Eastern District of Wisconsin agreed with the trial judge; and it was not until four years later that a split court of the Seventh Circuit Court of Appeals concluded, without evidence

in the record to substantiate such conclusion, that "* * * the search must therefore have been for incriminating evidence of other offenses." Thus, the Court set aside the findings of the District Court that the examination of the car at the garage was designed to locate an article of value to be protected by those responsible for its custody. The findings of the District Court, which were concurrent with the state trial court's findings, were not "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure. *Berenyi v. Immigration and Naturalization Service* (1967), 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed. 2d 656; *Graver Tank and Mfg. Co. v. Linde Air Prod. Co.* (1948), 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672.

Courts of appeal should not reweigh the evidence and findings concerning credibility. *United States v. Iaculla* (7th Cir., 1955), 226 F. 2d 788, 795, cert. den. 350 U.S. 966.

C. *The search of the Dodge was in accordance with constitutional requirements.*

The court below seems to be confused as to the sequence of events which led up to Mauer, the Crime Laboratory specialist, taking up the piece of floor mat and the bloody sock in the Dodge and labeling them on September 13, 1967. The court concluded:

> "There was no continuing authority under the warrant issued the previous night. First, these items were not described in the warrant and presumably were not observed that night. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio.* A 'new ball game,' so to speak, began when Mauer made his 'inspection.' " (Slip opinion, p. 9, App. 111.)

A complete examination of the file, including the trial record and the proceedings conducted by the county judge prior to the issuance of the search warrant, indicates that the judge ordered not only that a search warrant be issued for the Dodge but that the vehicle be impounded (Record Exhibit A, p. 18). Thereafter, that evening, the sheriff's office contacted a wrecker service, had the Dodge towed to the police garage in Fond du Lac where the search was conducted the next morning by the sheriff's representatives and representatives of the State Crime Laboratory from Madison who had been called in to assist the sheriff in the professional search of the vehicle for evidence of murder (Record Exhibit C, p. 463).

It was at this time, the morning of September 13, 1967, that Mr. Mauer; the undersheriff of Fond du Lac County, Raymond Howard; and Mr. Sundberg from the Crime Laboratory removed from the Dodge vehicle, which had been towed into the sheriff's garage, all of the bloodied contents of the Dodge, including the back seat, front seat, backrest of the back seat, a white sock, a portion of the floor mat in the rear, an attache case, and the front floor mat, all of which were taken to the Crime Laboratory for clinical tests and later introduced in evidence at the trial.

A formal hearing on the return of the search warrant was held before the county judge on September 14, 1967. (Record Exhibit A, pp. 22-26).

Testimony at trial from Mr. Mauer established that all of the bloodied items from the Dodge were removed on the morning of September 13, 1967. Therefore, the court below was in error in concluding that the warrant was returned before Mauer came on the scene.

Therefore, as to all of the evidence found in the Dodge, the sequence for search and seizure was the same. The undersheriff looked into the vehicle, saw what appeared to be blood on a briefcase and the back seat, went to a judge to secure a search warrant, called in the experts from the Crime Laboratory to help conduct the search of the vehicle, obtained the search warrant and the oral order to impound, took the vehicle to the sheriff's garage after dark on September 12, 1967, and conducted the search on September 13, 1967. Mauer saw what appeared to be blood on the floor mat and on the sock, which were in plain view when he opened the doors of the Dodge. The sheriff and his assistants were conducting an authorized search of a piece of evidence—the vehicle.

Again in the case of the search of the Dodge the lower court has changed trial court findings without such findings being "clearly erroneous" within the meaning of Rule 52 (a), Federal Rules of Civil Procedure.

II. There Is A Conflict Among The Courts Of Appeal On What Constitutes A Search.

In *United States v. Mitchell* (9th Cir., 1972), 458 F. 2d 960, the court held that where the defendant's automobile had been lawfully impounded the discovery of a revolver by a police officer while placing a number of valuable watches into an open sample case on the floor of the auto did not constitute an unlawful search and seizure since the officer was performing the reasonable police function of protecting the defendant's personal property.

In *United States v. Ware* (7th Cir., 1972), 457 F. 2d 828, the United States Court of Appeals for the Seventh Circuit

held that checking the confidential vehicle identification number stamped on the frame of the motor vehicle that "* * * the totality of the circumstances was sufficient to give the officers the right to search, if, indeed, this was a search." Judge Kiley, the author of the opinion in the instant case, dissented, pointing out "* * * It is noteworthy that the police also searched the trunk and the interior of the car while looking for the confidential vehicle identification number."

See also *DiMarco v. Greene* (6th Cir., 1967), 385 F. 2d 556; *United States v. Dento* (3rd Cir., 1967), 382 F. 2d 361; and *United States v. Blackburn* (6th Cir., 1968), 389 F. 2d 93.

III. The Decision Below Is In Direct Conflict With Public Policy As Established By The Highest Court Of The State Of Wisconsin And Other State Courts.

The trial judge, the Wisconsin Supreme Court, and the District Court all found that the inspection of the Thunderbird was accomplished while the police were responsible for its protection and were in the process of protecting Dombrowski's property and were not at that time engaged in the search of the car looking for incriminating evidence so as to violate Dombrowski's Fourth Amendment rights.

In *Cabbler v. Virginia*, supra, Cabbler had been arrested by the Roanoke Police Department for shooting into an occupied dwelling. He was taken into custody and his automobile was parked in such a manner as to partially block the ambulance driveway leading to a hospital emergency entrance. After Cabbler's arrest, the automobile was removed from the hospital driveway to the city garage for safekeeping until

Cabbler's release from custody. Being stored in the city garage, the vehicle was taken to the property room where the contents of the car were to be removed, inventoried, and stored for safekeeping. It was then that the police discovered stolen goods that resulted in Cabbler's later convictions.

For other cases approving the use of evidence discovered inadvertently while inspecting or searching under prior justification, see *Commonwealth v. Haefeli* (1972), — Mass. —, 279 N.E. 2d 915; *Aaron v. State* (1971), — Del. Supr. —, 275 A. 2d 791; and *People v. Lanthier* (1971), 97 Cal. Rptr. 297, 488 P. 2d 625.

IV. The Effect Of The Decision Below Is Undesirable.

Mr. Chief Justice Burger in his dissent in *Bivens v. Six Unknown Federal Narcotics Agents* (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, 636, in referring to the questionable deterrent value of the exclusionary rule, quoted from Mr. Justice Cardozo's statement in *People v. Defore* (1926), 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588:

> "The criminal is to go free because the constable has blundered. . . . A room is searched against the law, and the body of a murdered man is found. . . . The privacy of the home has been infringed, and the murderer goes free."

If this is the case where society must prevent the introduction of the bloody items seized from Dombrowski's Thunderbird under the exclusionary rule to punish Officer Weiss for allegedly violating Dombrowski's Fourth Amendment rights, then it appears that society is paying a tremendous price in a futile attempt to teach an officer a lesson for doing what he thought was his duty.

But what are we trying to teach Officer Weiss? Are we saying that he should not attempt to secure the property of a person who is incapacitated and in the custody of his department? Or is society telling Officer Weiss that he should have gone to a judge to determine if he could get a search warrant to inspect the Thunderbird? Of course it is obvious that under the facts as they existed, no search warrant could be legally issued.

What we are saying, then, is that we will not allow fate or divine providence, or whatever we want to call such a force, to assist in the discovery of a heinous crime.

If the lower court decision is allowed to stand, valuable and possibly critically necessary pieces of evidence from the Thunderbird and the Dodge cannot be used in evidence. In addition, it would appear that under the "fruit of the poison tree" doctrine the accused could bar all evidence subsequently discovered as the result of the faulty seizure of evidence in the Thunderbird.

If Dombrowski, the murderer, goes free, what benefit are we thereby accruing to society? Is the theory of the exclusionary rule here applied, that Officer Weiss and thousands of other officers throughout the country will refrain from attempting to locate property of one under arrest either valid or desirable? Would accurate, definitive word filter down to the police officer on the street who is faced with making the ultimate decisions on short notice at odd hours without a lawyer present to consult with?

Again, Mr. Chief Justice Burger answered that question in his dissent in *Bivens*, supra, when he pointed out that the theoretical educational effect of higher court decisions is greatly diminished in fact by the realities of law enforcement work.

Would we want Officer Weiss to cease any further inventory inspections in situations where the incoherent motorist has just advised the officer that he sells diamonds to jewelry stores in the area? Or what if he said he was a drug salesman?

It is submitted that the decision below that Dombrowski's Fourth Amendment rights were violated by improper seizure of evidence in the Thunderbird is based upon an erroneous finding that Officer Weiss was looking for incriminating evidence of other offenses. As to the Dodge, the court below erroneously concluded that the search warrant had expired and was *functus officio*. It is unfortunate that the court did not avail itself of the trial transcript and Record Exhibit A before adopting findings contrary to the trial court.

CONCLUSION

It is therefore respectfully submitted that certiorari should be granted and that in the alternative: (1) The decision below be summarily reversed. (2) The case be remanded for further proceedings. (3) The case be argued fully on the merits, including the wisdom of the exclusionary rule.

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APPENDIX

Decision of the Court of Appeals reversing the District Court judgment with direction to grant the writ of habeas corpus unless the Wisconsin authorities grant the petitioner a new trial within a reasonable period to be set by the District Court.

IN THE

United States Court of Appeals

For the Seventh Circuit

September Term, 1971 — January Session, 1972

No. 71-1094

Chester J. Dombrowski,
Petitioner-Appellant,

v.

Elmer O. Cady,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 70-C-129
Myron L. Gordon, *Judge.*

Argued January 19, 1972 — Decided June 2, 1972

Before Knoch, *Senior Circuit Judge,* Kiley and Fairchild, *Circuit Judges.*

Kiley, *Circuit Judge.* The district court denied petitioner Dombrowski habeas corpus relief from his imprisonment in Wisconsin for murder. We reverse.

Dombrowski, a Chicago policeman, on September 9, 1967, drove his 1960 Dodge to Fond du Lac, Wisconsin, to visit his brother's farm. That evening the Dodge was disabled and on September 10 was towed to the farm, where Dombrowski left it. He returned to Chicago with his brother. In Chicago, at 12:30 a.m. September 11, Dombrowski rented a 1967 black-over-maroon Ford. Dombrowski was seen about 9:40 a.m. purchasing two hand towels in Kewaskum, Wisconsin.

About 10:30 p.m. that night Dombrowski drove the Ford off a highway and crashed into a bridge abutment. A passerby took him to Kewaskum where Dombrowski notified the sheriff's office about the Ford mishap. Two deputies drove him to the scene of the accident, and on the way he told them that he was a Chicago policeman.

At the scene one of the deputies searched the inside of the Ford, looking for defendant's service revolver. The trunk was not searched. The Ford was locked by a deputy, who kept the keys, and the Ford then was towed to a private garage in Kewaskum. Dombrowski was taken to the sheriff's office in West Bend where he was "arrested" for "drunken driving" and taken to the West Bend hospital.

After leaving the Ford, one of the deputies, at approximately 2:13 a.m., went to the Kewaskum garage and—without the knowledge or consent of Dombrowski—made a warrantless search of the Ford. The deputy seized from the trunk, *inter alia*, a towel, a piece of a floor mat, a night stick and a police officer's uniform pants. All items were spattered with blood.

Dombrowski, while in the hospital during the morning of September 12, retained an attorney from West Bend. The attorney conferred with Dombrowski at the hospital and then informed the local county prosecutor that a body could be found on Dombrowski's brother's farm. At about 3:00 p.m. Washington and Fond du Lac County sheriff's officials went to the farm and conducted an extensive warrantless search. In the search a dead body was found in the dump area about three blocks from where the Dodge was parked. Near the body a white sock was found.

One officer peered into Dombrowski's Dodge and saw the back seat saturated with what appeared to be blood, and a briefcase stained with blood. The Dodge, however, was not searched at the time. A warrant was obtained at about 8:00 p.m. and the car seat and briefcase were seized. The next

morning, September 13, another search was made and a bloodied sock and piece of floor mat were seized. The items seized in the search of the Ford early on September 12 and in the searches of the Dodge were admitted into evidence, over objection, at the Dombrowski trial for the murder of the man found dead on the Dombrowski farm. The jury convicted Dombrowski and he was sentenced to life imprisonment. The Supreme Court of Wisconsin affirmed the jury conviction. *State v. Dombrowski*, 44 Wis. 2d 486 (1969).

I.

A majority of the Wisconsin Supreme Court[1] decided that the police action which discovered the incriminatory evidence in the Ford was not a search, but an inspection, under the doctrine of *Harris v. United States*, 390 U.S. 234 (1968).

This habeas proceeding followed. Dombrowski alleged, *inter alia*, that the search and seizure were unreasonable and violated his Fourth Amendment right. The district court, in denying Dombrowski habeas relief, followed the Wisconsin Supreme Court's opinion and held that the "inspection" was reasonable and not violative of Dombrowski's Fourth Amendment right.[2] It is conceded here by the State that the "inspection" was a search.

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[1]"A minority of this court, including the writer of this opinion, concludes that the seizure here was a search. . . . The minority would conclude that the search was unreasonable for the same reason that the search was declared illegal in *Preston v. United States.*" *State v. Dombrowski*, 44 Wis. 2d 486, 497 (1969).

[2]The court did not specifically pass upon Dombrowski's allegations that the searching of the farm and the Dodge was illegal or that the exercise of his Sixth Amendment right was interfered with. *Dombrowski v. Cady*, 319 F. Supp. 530, 533 (1970).

When the inside of the Ford was searched at the scene of the mishap, the police had no knowledge of the homicide. The search of the Ford was aimed at finding Dombrowski's service revolver. The trunk was not searched, presumably because—the revolver not being in the passenger area of the Ford—there was no danger to the arresting officers. When the deferred search was made at the Kewaskum garage, the officer knew no more than he did at the time of the original search. At the time of the second search, no further evidence was needed to sustain the charge of driving while intoxicated. The search must therefore have been for incriminating evidence of other offenses. *See United States v. Ware*, No. 71-1380 (7th Cir. March 29, 1972) (dissenting opinion). We are not persuaded that protection was needed, since the revolver was, if any place, in the locked trunk.

There was no basis upon which the police could reasonably decide that they were in danger, or that the Ford was a "fleeting target" which posed danger to evidence, or which might be driven out of the jurisdiction so as to invoke the exception to the Fourth Amendment warrant clause enunciated in *Carroll v. United States*, 267 U.S. 132 (1925). The Ford, immobilized by the accident, was locked by the police at the Kewaskum private garage in the early morning when searched. The police had no inkling that there was evidence in the Ford of any offense by Dombrowski other than the drunken driving of which the police knew. And it seems highly unlikely that in the small town of Kewaskum there was danger of anyone going to the garage, getting into the Ford, and driving it away. *Cf. United States v. Castaldi*, 453 F. 2d 506 (7th Cir. 1971). When the police searched the Ford at the scene of the accident they had probable cause to arrest Dombrowski for driving while intoxicated. They had no justification to search except to look for the

gun in the interest of safety. There was no justification therefore under *Chambers v. Maroney*, 399 U.S. 42 (1970),[3] for the warrantless deferred search.

Under *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), warrantless searches are per se unreasonable. There are but few exceptions, and to come within one of them it must be shown that the "exigencies of the situation" rendered the warrantless search imperative. *Coolidge* at 454-455. There is no showing in the record here of any exigency justifying the deferred search of the Ford.

We think the deferred search was unreasonable under the Supreme Court's holding in *Preston v. United States*, 376 U.S. 364 (1964). In *Preston*, acting upon a telephone complaint that "three suspicious men were acting suspiciously," police found Preston and two other men sitting in a parked car in a business district. *Preston* at 365. Under questioning the men gave evasive answers, stated they were unemployed, and had among them only twenty-five cents. The men were arrested for vagrancy and taken to the police station. The car was taken by police to a garage. After the men were booked for vagrancy, police went to the garage and a warrantless search of the car produced two loaded guns from the glove compartment and

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[3]In *Chambers*, almost immediately after an armed robbery of a gas station, police were told a blue compact station wagon was used by the four robbers, one of whom wore a green sweater and another a trench coat. Within an hour a blue compact station wagon carrying four men was stopped two miles from the gas station. Chambers was one of the four men and was wearing a green sweater, and a trench coat was in the car. The occupants were arrested, the car was driven to the police station and there searched without a warrant. The Court held a warrant unnecessary, since the police had probable cause to search the car without a warrant on the highway—because of the exigent circumstances—and the probable cause factor carried over to the station and the search there was reasonable.

various incriminating items from the trunk. The warrantless searches "at another time and place" were held unreasonable since the men were under arrest and were no danger to the officers, could not have destroyed the evidence of the "crime" of vagrancy, or could not have removed the car from the jurisdiction. *Preston* at 368.

Here the bloodied towel, piece of floor mat, night stick, and officer's uniform pants seized in the deferred search substantially contributed to Dombrowski's conviction of murder. The towel and piece of floor mat were matched at the trial with evidence seized in a subsequent search of Dombrowski's Dodge on the farm the morning of September 13. The trial was therefore tainted by the use of the bloody towel and piece of mat, seized in the unresonable warrantless search of the Ford. We hold that the trial court committed error of constitutional dimension in denying Dombrowski's motion to suppress the items seized in the Ford and admitting them into evidence at the murder trial over his objection.

II.

Should Dombrowski be tried again it is likely that Wisconsin will intend to use evidence gathered in the searches of the farm and the Dodge. The reason is that the Wisconsin Supreme Court has decided the searches of the farm and Dombrowski's Dodge on September 12 and 13 were not illegal[4] and that no constitutional error was committed in admitting the products of the searches into evidence. Assuming the case is retried, the trial court would be bound by that decision and corresponding rulings would likely be made upon Dombrowski's objections. We are not bound by the Wisconsin Supreme Court

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[4]*Dombrowski v. State*, 44 Wis. 2d at 498-499.

decision, however. *See Townsend v. Sain*, 372 U.S. 293, 312 (1963). We deem it prudent to preclude, if we can, serious error at a second state trial. We conclude therefore that we should consider Dombrowski's constitutional challenges of the September 12 and 13 searches of the Dodge.

The five hour warrantless search of the farm on September 12 began about 3:00 p.m. The sheriff's police before entering the farm had possession of the items seized in the search of the Ford in Kewaskum and had received the subsequent information from Dombrowski's attorney that a body could be found at the farm. It is clear that police may not use evidence previously seized in an illegal search to justify probable cause for a subsequent arrest. Such a bootstrap practice would be abhorrent to our constitutional search and seizure principles. The validity of the warrantless search accordingly must be based upon the information given by the attorney.

We see no reason for denying to the hearsay statement of the attorney the reliability given to hearsay information exchanged between law enforcement officers. The courts have found information from one policeman to another sufficiently reliable for issuance of a warrant. *United States v. Ventresca*, 380 U.S. 102 (1965); *accord, Aguilar v. Texas*, 378 U.S. 108 (1964). The officers accordingly could well give credence to what Dombrowski's attorney told them. And we think that police proceeding forthwith onto the farm, without a warrant, to find the body was prudent police work. The person might not be dead and might die if not rescued. We think that to require the police to have delayed the search until a warrant was obtained would be unreasonable under these circumstances.

This court's decision in *United States v. Hull*, 441 F.2d 308, 313 (7th Cir. 1971), does not preclude our conclusion. The court there decided that a defendant's Fifth Amendment right against self-incrimination cannot be balanced against police officers' "sincere attempts" to rescue a missing undercover agent, since involuntary incriminating statements "can be no less compelled in one type of case than another." The reason is that no balancing is needed to determine that an involuntary self-incriminating statement violates the Fifth Amendment, *i.e.*, a good end does not justify unlawful means. However, in search and seizure cases, assuming a good end, such as protecting the body if alive, the question is whether the means—the search and seizure—are lawful. Whether the means are lawful, however, requires balancing of circumstances, *e.g.*, do the circumstances on balance show probable cause, fleeting target, incident to arrest. We hold that entry of the farm without warrant was lawful and the search of the farm for the body was reasonable. The lawful farm search produced the body. Neither do we see an unreasonable widening of the legal search in seizing the white sock in plain view nearby.

After the body and sock were found, the police officer peered into the Dodge and observed the blood soaked back seat and briefcase. On the basis of what was found and observed, the police at about 8:00 p.m. obtained a warrant to search the Dodge. The warrant was executed and the return of the warrant listed the items seized. The incriminating piece of mat and the bloodied white sock were not listed in the return and presumably had not been seen the night before.

The next morning, September 13, Mauer, a crime laboratory specialist,[5] searched the Dodge and "[took] up" the piece of the floor mat and a bloody sock, and labeled them. *Dombrowski* at 498. He acted under "authority" of the warrant issued the previous night. The Wisconsin trial court denied Dombrowski's motion to suppress these two items and later admitted them into evidence over objection. The bloodied piece of mat was matched at the trial with the piece seized in the illegal search of the Ford, and the bloody sock matched with the sock seized near the body on the farm.

Dombrowski challenges these searches as violative of his Fourth Amendment right, and the use of the evidence seized as constitutional error.

The Dodge had been placed on the farm where Dombrowski could legitimately place it, the search was directed at his Dodge and, by indirection, at him. He has standing therefore to challenge the legality of the search. *See Jones v. United States*, 362 U.S. 257, 267 (1960).

The question with respect to the search[6] of the Dodge the night of September 12 requires a determination whether the product of the police officer's observation of the inside of the Dodge was unlawful under the "plain view" doctrine. The plain view doctrine applies only where the discovery was "inadvertent. . . . But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different."

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[5]Crime Laboratory Division of the Wisconsin Department of Justice.

[6]We need not decide whether the attorney's statement to the police and the testimony of Officer Howard in obtaining the search warrant were fruit of the unlawful search of the Ford. The police were lawfully on the farm and the plain view doctrine justifies the seizure of the items that were observed by Howard in the Dodge.

Coolidge at 469-470.[7] We cannot read the record before us to give any indication that the police officer who peered into the Dodge had no right to be where he was when he observed what was in the car (*cf. Harris* at 236), or that he knew at the time there was evidence in the Dodge and intended to seize it. *Coolidge* at 470. Consequently we read the record as showing that the observation was "inadvertent" and what was seen could be properly used to justify the search. Our conclusion is that the back seat and briefcase were properly seized in a lawful search.

The Wisconsin Supreme Court decided that the bloodied piece of mat and white sock seized by Mauer, the crime laboratory specialist, were "in plain view and subject to seizure without a warrant." *Dombrowski* at 499. We disagree. We assume that Mauer was rightfully at the scene. But it is clear that his discovery was not "inadvertent." He was searching for further evidence concerning the homicide. Accordingly, the plain view doctrine does not justify his warrantless search and seizure.

The Wisconsin court justified Mauer's taking the bloodied items as authorized under the warrant issued the previous night. We have expressly refrained from deciding whether that warrant was valid. See footnote 6. Assuming arguendo, however, that the warrant was validly issued, the objects described in the warrant were the bloodied back seat and the briefcase. The police did not observe, use in the application for the warrant, list in the return, or seize, that night, the bloodied sock and piece of mat. These two items were seized by Mauer the next day.

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[7] See also, *The Supreme Court 1970 Term*, 85 HARV. L. REV. 243-250 (1971).

There was no continuing authority under the warrant issued the previous night. First, these items were not described in the warrant and presumably were not observed that night. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio.* A "new ball game," so to speak, began when Mauer made his "inspection."

Having found that Mauer unlawfully seized the bloodied sock and piece of mat, we conclude that their admission into evidence was constitutional error. The conviction is void.

We reverse the district court judgment dismissing the petition for the writ and remand with direction to grant the relief prayed for in the petition unless the Wisconsin authorities grant Dombrowski a new trial within a reasonable period to be set by the district court.

REVERSED AND REMANDED.

KNOCH, *Senior Circuit Judge.* (dissenting) The trial judge who saw and heard the witnesses credited their testimony that the local police officers did believe that all Chicago policemen carried sidearms. Granted this belief, it was only reasonable to look for the apparently missing sidearm. It would be unreasonable to rely on information from the petitioner whose state had so impressed them that they sought a sobriety test for him. The original cursory check of the glove compartment and back seat was hardly sufficient. It would be careless to leave a firearm in the trunk of an automobile in a public garage, even in the small town of Kewaskum where the majority believes there was little chance of anyone's improperly getting possession of the automobile. If the firearm had been there, had been improperly secured by some unauthorized person and used to injure a citizen, then the police would have been remiss in their performance of duty and morally responsible for whatever happened as a

result. Despite the concession of the respondent, I find more persuasive the conclusion of the majority of the Wisconsin Supreme Court that this check of the automobile was not a search, but an inspection. I would affirm the conviction.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

July 24, 1972

Before

Hon. WIN G. KNOCH, Sr. Circuit Judge

Hon. ROGER J. KILEY, Circuit Judge

Hon. THOMAS E. FAIRCHILD, Circuit Judge

CHESTER J. DOMBROWSKI,
Petitioner-Appellant,

No. 71-1094 vs.

ELMER CADY, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin, (70 C 129)

On consideration of the petition for rehearing and suggestion that it be heard en banc filed in the above-entitled cause, no judge in active service having requested a vote thereon, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.